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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1905.

No. [illegible].220

DAVIDSON STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

CHARLES E. KREMER,
HERMON A. KELLEY,
Attorneys for Plaintiff in Error.

GEO. HORNSTEIN CO., PRINTERS, CHICAGO

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Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

On the night of the 24th day of July, 1901, the steamer Shenandoah, loaded with a cargo of about thirty-three hundred tons of iron ore and bound from Superior, Wisconsin, to Two Harbors, Minnesota, ran into the Government breakwater at the latter place.

Agate Bay, Lake Superior, is the harbor of the village of Two Harbors and is an open bay, across the mouth of which there are breakwaters extending from either shore running in an easterly and westerly direction, leaving an open space as an entrance to the iron ore and other docks in the bay.

The breakwater which extends from the easterly side of the bay had been constructed for a number of years and extended in a westerly direction at right angles across the mouth of the bay, a distance of about seven hundred and fifty feet, and the end of this breakwater had been marked by a large fixed red light on a timber frame work some fifteen or twenty feet above the breakwater.

On the other side of the mouth of the bay, extending in an easterly direction from the west shore of the bay, was a similar breakwater without any light, leaving, therefore, an opening of about 1,500 feet through which vessels entered the bay. In 1899 the government projected an extension of the easterly breakwater, which was to extend at an angle of forty-five degrees from the original breakwater a distance of about three hundred feet.

At the time of the collision this extension of the breakwater composed of wooden cribs filled with stone, had been extended its full length, but not built up, and, therefore, was only a few inches above the surface of the water. The extreme outer end of the new extension had erected on it a mast or pole about twelve feet high and on this was hung an ordinary white light, or lantern. The original fixed red light on the old breakwater had been moved back some thirty feet from this breakwater in order that the new work of the breakwater might be properly joined to the old work.

The testimony shows that Captain McAvoy, in command of the steamer Shenandoah, loaded a cargo of iron ore at Superior, Wisconsin, and then proceeded to Two Harbors for the purpose of taking

in tow a barge which was being loaded there. It was dark and stormy when the Shenandoah left Superior, and the sky was covered with clouds, there was a heavy wind blowing from the northeast, making a high sea. The Shenandoah arrived off Two Harbors at about 11 o'clock p. m., and ran northeast of the harbor in order to get directly before the northeast wind and thereby make a safer entrance. The steamer's speed was checked and she was headed for the entrance, intending to turn and enter port as she had formerly done close to the red light. When she had approached within about two hundred feet of the new breakwater the surf was seen breaking on it, and her engine was promptly stopped and reversed, but notwithstanding this she struck the extension of the new breakwater about one hundred and twenty-five feet from the fixed red light, doing considerable damage to the breakwater, but without any injury to herself.

Captain McAvoy testifies that on the way over from Superior to Two Harbors he examined a book (Defendant's Exhibit "I") published by the Lighthouse Board as a guide to navigation, showing lights, breakwaters, etc., an extract of which is in evidence and found at page 177, and from this he learned that the light on the breakwater at Two Harbors was a fixed red light. He testifies also that he did not know that the breakwater was being extended, had no information as to its existence, and the first knowledge that he had that it was there was when he saw the sea breaking over it about two hundred feet away, and after that he made every effort to avoid striking it.

It is contended on behalf of the Government that the defendant was guilty of negligence in that the master of the Shenandoah was bound to know of the existence of the breakwater and, therefore, it was negligence to collide with and injure it.

On behalf of the defendant we contend:

First. That the existence of the breakwater was not known, and that it could not, in the darkness, be seen in sufficient time to be avoided.

Second. That no negligence is shown on the part of the master of the Shenandoah.

Third. That the evidence shows such contributory negligence on the part of the Government that there is no right of recovery.

The specific negligence of the Government consists:

First. In not having published or given notice of the actual construction or location of the breakwater.

Second. In not giving notice of the white light which was being displayed to mark it.

Third. In giving misleading notices indicating that the breakwater was completed and that the end of it was marked by a red light.

Fourth. In using a white instead of a red light to mark the outer end of the breakwater.

A trial of the issues was had before a jury at Duluth, Minnesota, and at the close of the plaintiff's evidence a motion was made to the court to direct a verdict in favor of the defendant. This motion was overruled, and was again made at the close of

all the evidence and overruled a second time. The case then went to a jury and they found a verdict in favor of the Government for the sum of four thousand and twelve dollars and fifty cents. The motion for a new trial was overruled, and thereupon assignment of errors were filed and the case removed to the United States Circuit Court of Appeals for the Eighth Circuit. Here the judgment of the Circuit Court was affirmed.

Thereupon assignment of errors were filed in the Court of Appeals and the case removed to this court.

ARGUMENT.

Agate Bay, the harbor of the port of Two Harbors, Minnesota, is about twenty-seven miles from Duluth, and one of the most important iron ore loading ports on the great lakes.

Exhibit "A" of the record, page 181, is a chart of Agate Bay introduced by the Government, and shows that a harbor is made of this bay by constructing breakwaters across its opening into Lake Superior. The original breakwaters ran out from each shore across the mouth of the bay on each side for a distance of some seven hundred and fifty feet. The projected extension of the east breakwater out into the bay was an obstruction to navigation placed almost directly across the course and path of every vessel that might come in or go out of the bay. It was an obstruction of the most dangerous kind to

vessels. It was much more so than the usual harbor piers are. These usually extend out into the open water of the lake and an entry between them requires approaching them so that they obstruct only to the extent of their width, and not their length, and whether they be long or short is a matter of indifference to the mariner who approaches them "end on," as it were. The character of this extension of the breakwater at Agate Bay was entirely different. It was across the course of vessels and not parallel with that course. The character of this alleged improvement was such that its dangers to vessels and navigators would suggest that proper notice of its projected construction should be given and published so that it might become known to all mariners who would desire to enter Agate Bay. Not alone should notice be given of the projected construction, but the greatest publicity should have been given to the progress of the work as soon as it became in any way a menace to navigation. Only the widest publicity of the construction of this extension of the breakwater could prevent disaster, both to incoming and outgoing vessels, and to the work itself. It was, therefore, the duty of the Government to widely publish and disseminate notice of the projected work and its progress.

In addition to this, as soon as the work carried on there, became an actual obstruction, signals and warnings should be so displayed as to effectually bring home notice to the mariner that there was danger, so that damage to the vessel and the structure might be avoided. In displaying a signal and a warning to mariners, it is important that it be of

such a character that it would be understood as such by the mariner. It was unimportant to the *man on land* because he was in no way interested. He was not using the harbor or the breakwater for any purpose; it was only a danger to the navigator and, therefore, it was he that was to be warned, and a signal which would warn him was the only efficient signal which the Government could safely employ. It must be a signal which would be understood by mariners as a signal of warning and danger. It should have been such a signal as could not have been mistaken as meaning something else. This work at the time of this disaster, was but a few inches above the surface of the water for the entire three hundred feet of its length. In the daytime it could be readily seen a sufficient distance away so that it could be avoided, but at night it was impossible to see it, and a light, or lights, were absolutely necessary to apprise the incoming mariner of its presence.

The Government contends that it gave notice of the projected extension of the breakwater by sending out the printed notices to mariners as follows:

July 29th, 1899, Exhibit "B."

August 11th, 1900. Exhibit "C."

It also claims that Exhibit "A," a chart of Agate Bay showing the projected breakwater in dotted lines, could have been purchased by mariners at Detroit, Michigan.

It further states that at different offices on the great lakes Exhibit "D," a bulletin of the Engineers' department, could be had on application (p. 59). In addition to these the Lighthouse Board

had issued its List of Lights, etc., corrected to the opening of navigation, 1901. (Defendant's Exhibit I.) These are all the notices that were issued by any department of the Government prior to this disaster.

The work of construction was done under the supervision of the War Department represented by Captain Gaillard, Corps of Engineers.

The notices to mariners (Exhibits B and C) were sent out by the hydrographic office of the Navy Department at Duluth. The lights and light houses were under the charge of the Light House Board of the Treasury Department, and since its establishment, are under the charge of the Department of Commerce and Labor, and were to be found in a publication issued by this board. Three independent departments of the Government were therefore interested in this work so far as it concerned the navigators of Lake Superior and Agate Bay.

It will be seen (p. 59) that the War Department, under whose supervision this work was done, *did not publish or send out to vessel owners or masters any notice of the projected work, or of what was being done during the process of construction,* neither did it keep the Navy Department informed of what it was doing so that the latter could send out notices to mariners through the hydrographic office. All that it did, was to issue and deliver its own bulletins to its subordinates and these bulletins could be had on application. The actual notice it had nothing to do with, and did not furnish to any one, *not even to the other departments of the Government, whose duty it was to inform the mariners by publishing and*

sending directly to them the notices of what was being done.

It is not claimed that any notice of the actual construction of the breakwater or what its condition was on the night of the disaster, or what light it bore, was ever sent out prior to the disaster. The court refused to permit the defendant to show that it was sent out afterwards on October 19th, 1901.

We contend:

First. That the notices which the Government sent out to mariners, Exhibits "B" and "C," were either never sent to Captain McAvoy, master of the Shenandoah, or were not received by him.

Second. That had he received and read them, they would not have informed him of the obstruction which he encountered and collided with.

As to the chart, Exhibit "A," we contend:

First. That while it might have been had on application, it was not the duty of Captain McAvoy to look for or purchase the chart, as the Government sent out notices to mariners, containing all the information needed.

Second. Had it been in his possession it would not have apprised him of the presence of the obstruction, but would, on the other hand, have shown him that where he attempted to enter port, there was a sufficient depth of water for him to do so with perfect safety.

As to Exhibit "D," the testimony of Captains Leisk, Chilson, Lyons, Frank McAvoy and Allen shows that it was not usual, or the practice of ship-

masters to call at the Engineer's offices for these pamphlets or the information they contained, nor did it contain the information of the actual condition of the breakwater on the night of the disaster.

We say, therefore, that there was no such notice of this new breakwater brought home to Captain McAvoy as to put him on his guard, and cause him to look for and avoid it. That being so, was the breakwater so lighted as to warn a master of ordinary skill, exercising ordinary care in entering Agate Bay at night, and apprise him of the dangerous condition of this submerged obstruction?

The light house book of 1901 notified mariners that the *end* of the breakwater was marked by a fixed red light. The notices, Exhibits "B" and "C," were, as we shall see, misleading in that they would lead the mariner to suppose that the extension was completed in 1900, and would therefore lead him to infer that the fixed red light was on the end of the completed breakwater.

But, the Government claims that in using an ordinary white light displayed from a pole at the extreme outer end of the breakwater it was notifying mariners that there was an obstruction out beyond the red light, which its lighthouse book said was on the end of the breakwater. As to this we say that the light used by the Government was a wrong and misleading light, because it would be, and was, mistaken for an anchor light displayed by a vessel at anchor in the Bay, such a light as the law requires shall be shown by a vessel at anchor. It was, therefore, a misleading light, one that would deceive and not guide the mariner. It was the mariner who was

to be warned, and the Government was bound to use a light that would warn him, no matter what it might mean to others. Would a white light warn him? It would not. It would lead him into destruction and not to safety. It would turn him toward the danger and not away from it. It was, therefore, negligence on the part of the Government to use such a light.

The Government should have displayed such a light as could not be misunderstood by mariners. A light that meant to them that there was present danger; such a light was, and is, a red light on land or at sea. It is well known as a danger signal. It cannot, when stationary, be taken for anything else. It then means but one thing, and that is danger. It would mean to the mariner to pause, to investigate and learn where and what the danger was. It would moreover have complied with the notice of the light-house board to the effect that the end of the breakwater was marked by a red light and would have made that notice truthful instead of false and misleading. Had such a light been used Captain McAvoy would have seen two red lights and would have stopped or approached so slowly that he could have stopped in time to avoid the breakwater over which the northeast sea was breaking and flashing white in the darkness.

We will now take up these different points in their order, as to each of which assignment of errors have been filed.

EXHIBIT "B," BULLETIN OF THE HYDROGRAPHIC OFFICE ISSUED JULY 29, 1899.

The first notice of this projected breakwater which the Government claims it sent out, was a bulletin sent out by the hydrographic office at Duluth. It was dated July 29th, 1899, therefore nearly two years after the disaster occurred. It was offered in evidence by the Government (Rec., p. 42) and objected to by the defendant.

The court overruled the objection and it was admitted in evidence. To this ruling an exception was taken and error was assigned (see 6th Error, 189). The bulletin is as follows (Rec., 176):

> "(703) Lake Superior—Minnesota—Two Harbors—information concerning breakwater—Depth alongside docks—The following information concerning the Government breakwaters at Two Harbors was obtained from Mr. J. H. Darling, U. S. Assistant Engineer:
>
> "The breakwater at the west side of the harbor is built to the length of 750 feet, 150 feet to be added and finished in the year 1900.
>
> "The breakwater at the east side of the harbor is built to the length of 750 feet; the proposed extension of 250 feet in the same direction has been abandoned and in its stead an extension at an angle of 45 degrees southward 300 feet in length is proposed, making the entire length of this (eastern) breakwater 1,050 feet. *This is also to be finished in the year 1900.*
>
> "Information has been received from Mr. R. Angst, Chief Engineer of the Duluth and Iron Range Railway, that the least water on both sides of all the ore docks in Agate Bay, Two Harbors, is 20 feet, 18 feet on both sides of the merchandise dock, and the same depth on the southwest side of the coal dock."

Our objection to this notice is:

First. That the evidence does not show that it ever came to the hands of Captain McAvoy, or was seen by him, or that he in any manner became acquainted with the information it contained.

Second. That it did not amount to a notice of the construction of the breakwater with which the Shenandoah collided.

The only evidence in relation to the point of this notice having reached Captain McAvoy is found in the testimony of the officer in charge of the hydrographic office at Duluth.

Captain Heinrich, the hydrographer, page 42, says:

> "Q. Do you know whether Captain John McAvoy of the steamship Shenandoah was on the list at that time? A. Yes.
>
> "Q. Do you know whether you mailed a bulletin, or a copy of a bulletin, to Captain John McAvoy? A. Yes, sir."

There is nothing in this evidence to show where this bulletin was sent to, and nothing to indicate where the home or place of residence of Captain McAvoy was. The evidence simply is that he mailed one to Captain McAvoy without designation as to how he directed it, or to what point, and no evidence whatever that it was received by him.

Captain McAvoy testifies that he received bulletins but he has no recollection of having received this one, nor is there any evidence that any he received were received from the Duluth office. They might have come from some other hydrographic offices on the chain of lakes, and referred to work

going on elsewhere. The evidence, therefore, is not sufficient to show, even under the most liberal allowance of the rule, that the bulletin was enclosed and directed and mailed to Captain McAvoy at his home, residence or any place where he was liable to receive it. Unless the evidence shows that it was addressed to him at a place where he was liable to receive it, it is inadmissible unless it appears that it was received by Captain McAvoy. There is no such evidence in the record. On the contrary, he said he had no recollection of having received it.

Third. The contents of the bulletin do not amount to a notice. It simply states that an extension of 300 feet at an angle of 45 degrees is to be made of the east breakwater so that its entire length will be 1,050 feet, and:

This is also to be finished in the year 1900.

This last clause completely destroys the efficiency of this notice as such in this case. Had Captain McAvoy had this notice in his hands at the time, without any other notice he would have done just what he did, because he would have supposed that the extension had been finished in 1900, and that the red light which had always marked the end of the breakwater was marking the end of the extended and completed breakwater, and that it was perfectly safe to round it, as formerly. The lighthouse book which he consulted stated the end was marked by a red light. In the darkness he could not tell whether the breakwater was 750 or 1,050 feet in length. If the government notice was a reliable one and the lighthouse book could be depended on, he would be justified in passing around the red light

just as he attempted to do on the night of the collision. It is certain, at least, that there was nothing in this notice which indicated that there would be a different light to mark the extension, and he would be justified in assuming that the permanent red light would, when the extension was made, mark the extreme end, as it always had, and as the lighthouse book stated, it did. His bulletin, therefore, even had he known its contents, would not have told him there was danger, or that the breakwater had not been completed.

EXHIBIT "C," BULLETIN OF THE HYDROGRAPHIC OFFICE OF AUGUST 11TH, 1900.

As the next notice from the Government, in order of time, came the bulletin of the hydrographic office dated August 11th, 1900. (Plaintiff's Exhibit C.) This consists of an octavo pamphlet, entitled: Notice to Mariners, published weekly by the hydrographic office, No. 32, Washington, D. C., August 11th, 1900. It was sent out from Duluth.

The portion of said exhibit particularly referred to, and offered in evidence, is as follows:

> "859.) Lake Superior—Minnesota—Two Harbors—Breakwater—Caution. Referring to notice to Mariners, No. 30 (703), of 1899, further information has been received that all the work on the extension of the breakwater piers at Two Harbors has been actively carried on by the Government since the opening of navigation.
>
> "A communication from the contractor, dated July 31st, 1900, states that the submarine work on the extension of the east breakwater has now advanced so far as to leave only sixteen feet of water over the embankment. Such a spot is lo-

cated about 200 feet from the end of the old breakwater.

"Masters of vessels are therefore cautioned on entering the harbor, to give the old breakwater a berth of 300 feet, and not to round the east breakwater close on board, as formerly, on account of this danger."

We objected to the introduction of this circular: *First*, because there was not sufficient evidence that it had been sent to or received by Captain McAvoy. *Second*, that it did not amount to the notice of the existence of the breakwater with which the Shenandoah collided.

First. The Government relied upon the evidence of Heinrich, the hydrographer at Duluth, to establish the fact that Captain McAvoy had received this notice. On cross examination, page 42, the witness states:

Q. How do you know you sent this to Captain McAvoy? A. From our mailing list. Captain McAvoy's name and the steamer he is master of is on our mailing list.

Q. Does anything on that notice say that if it is not called for it will be returned to this office? A. No, sir.

Q. Then there is nothing to prevent the instrument, if not delivered, from being lost or destroyed? A. Nothing.

Q. You don't know whether Captain McAvoy received this or not? A. Indeed I do not.

There is no evidence that Captain McAvoy received this bulletin. There is no evidence that he knew what it contained. There is no evidence that he had the information which it sought to convey, and we believe that the Government has not, by its

evidence, brought home to Captain McAvoy the receipt of this bulletin, nor by sufficient evidence shown that it was addressed or placed in the mails and directed to Captain McAvoy at a point where he would probably receive it, or where it was usual for him to receive his mail.

Second, as to the bulletin itself. This bulletin in no way contradicted the previous bulletin, Exhibit B. Mariners were told in this bulletin that on July 31st, 1900, the work had progressed to a point where there was only sixteen feet of water over the embankment, and warned mariners to give the old breakwater a berth of 300 feet, or avoid it by that distance. Had Captain McAvoy had this circular nearly a year later, on the evening that he arrived at Two Harbors, in 1901, together with the other one, he could not have known that the red light which marked the end of the breakwater was not then marking the end of it as extended. The lighthouse book said it was so marked. He could not know in the darkness whether the breakwater was 750 feet long or not, nor could he tell the angle of its course from the lake side as he was approaching it. The last bulletin said it was to be finished in 1900. Even on the date that the bulletin was issued, the place was not a dangerous one to a vessel drawing less than sixteen feet of water, and there certainly was nothing that the vessel could injure in going across or over the embankment other than herself. The stone embankment could not be injured by the vessel striking it; besides that, she was not drawing water enough to strike it. But whatever may be said about this notice, like the other

one, it was no notice of the condition of the breakwater at the time the collision occurred. In both cases the master was justified in believing that the breakwater had been finished in 1900, as stated in the first circular, and that he was safe in going around the red light which would, in that case, mark the end of the extended breakwater, and in the lighthouse book which he consulted on this voyage to Two Harbors the end of the breakwater was marked by a red light.

He would have then had two bulletins: One issued in 1899, saying the breakwater was to be finished in 1900; another one, dated August 11, 1900, saying the work had progressed so far by July 31, 1900, that the foundation was all in and there was sixteen feet of water over it. None that it had not been completed as stated in Exhibit B. On the way over on July 24, 1901, Captain McAvoy consults his government lighthouse book corrected to May, 1901, and reads that the end of the government breakwater at Two Harbors is marked by a red light. This is just as it used to be. The work had evidently been finished. With this information before him, what could be expected?

The evidence shows that on the way over from Superior to Two Harbors the evening of the collision Captain McAvoy consulted the Government Lighthouse Book (known as Exhibit I, p. 177), corrected to May, 1901 (nine months later than bulletin Exhibit "C"), and learned that the breakwater at Two Harbors was lighted by a fixed red light (Rec., 93 and 94). This book was issued at Washington by the Government and corrected to the opening of

navigation of 1901 (Rec., 177), and Captain McAvoy therefore knew, that he was to meet a fixed red light on the end of the breakwater and had, therefore, no occasion to look for any other or different light or lights.

This lighthouse book is issued by the Lighthouse Department, and was then in the Treasury Department of the Government. This department of the Government had nothing to do with the construction of the breakwater, which was under the War Department, or with sending out notices to mariners, which was done by the Navy Department. All of these departments are strictly independent of each other, and neither reports to the other what it is doing.

As the Shenandoah was approaching Two Harbors on the night of the collision Captain McAvoy had no knowledge of the actual conditions as they existed there. He had not been there since 1898. He did not know that the partially submerged breakwater extended beyond the red light which he saw. He knew of no obstruction of any kind there. It is claimed, however, that had he read the Exhibits B and C he would have known.

Let us suppose, for the sake of argument, that he had received, read and actually had before him, with the lighthouse book which he consulted, these two bulletins; what would he have known? From these (and they were the only notices sent out) he could have known only that the breakwater was to have been completed in 1900, and by Exhibit "C" that the work had on July 31st, 1900, so far progressed that the foundation had been laid and that

in one spot there was sixteen feet of water. Suppose he had had all this information before him on July 24, 1901, with the lighthouse book of April, 1901, telling him of the red light, would he have looked for a hidden obstruction lighted by a white light? Would anyone have done so? Is it reasonable to suppose that he could have imagined that the Government work had not been completed as stated in the bulletin of July 29, 1899? When the bulletin of August 11, 1900, corroborated it, in stating how far the work had progressed at that time, leaving as it did at least five months in the year 1900—in all nearly a year—in which the work could have been completed. Can it be said, in the light of this evidence, that Captain McAvoy was guilty of negligence, or could have been guilty of negligence? A reliance upon such notices as he received, and as the Government now says he must have received, would have lulled him into security, for he could not have looked for an obstructing breakwater which the Government had sent him word would be completed in 1900. He was entering the harbor on the 24th of July, 1901, nearly a year after the last notice to mariners, viz.: (Bulletin, Exhibit "C," dated August 11th, 1900). Why would he look for danger when the work had been completed and the lighthouse book marked the end of the breakwater with a red light? If he relied on the bulletins and the lighthouse book he could safely navigate just where he did. Even though he had had the chart, "Exhibit A," it would not have contradicted what the bulletin said, for it indicated in dotted lines where the new breakwater was, and

even if it had been construed to mean that it was not yet completed, and therefore in contradiction of the bulletins, yet there was at least eighteen feet of water everywhere except on the one spot on the chart which showed a depth of sixteen feet. Even in the face of the chart Exhibit A and the engineer's bulletin (if he had called for these), he was safe in navigating his vessel where he did. If he could have known that, contrary to the bulletin of July 29th, 1899, the breakwater had not been completed in 1900, and contrary to the bulletin of August 11th, 1900, there was not eighteen or sixteen feet of water anywhere where the breakwater was to be built, but that without notice or information to any mariner (not actually on the ground and in sight of the work) the proposed breakwater was actually in place and obstructing the channel, then, no doubt, Captain McAvoy would have been negligent in running into a breakwater which notices to him had said was actually in existence and in place. In other words, had the notice which was given in October after the accident been seen by Captain McAvoy before July 24th, the collision would not have occurred. It is, therefore, perfectly apparent that the notices sent out were not notices of the true condition of the breakwater at the time of the collision, and if they were, they still did not amount to a sufficient notice to put him even upon inquiry, and the Government was therefore guilty of contributory negligence.

How can one escape the conviction that the Government was negligent? All the information sent out did not show the true condition, and was therefore misleading and wrong.

THE ENGINEER'S BULLETIN EXHIBIT "D."

This bulletin, dated April 10, 1901, states as follows:

> "East breakwater is 750 feet long and during next summer will be extended 300 feet in a southwesterly direction, the rip rap embankment being already in place under water, vessels should keep 300 feet away from the outer end of the east breakwater."

This bulletin, it is claimed, could have been had at the Engineer's office *on application.*

It is claimed that it was the duty of Capt. McAvoy to have applied for it. Not having done so, it is said that his ignorance of its contents is no justification, and he must, therefore, be held to have known what it contained, and the defendant bound in law by the information. It is not claimed that this bulletin was even sent out or called to the attention of mariners. We have shown by the preponderating evidence of the ship masters that they had never heard of the publications of such bulletins and had never applied for them for that reason. The information, therefore, did not reach shipmasters, and did not reach Captain McAvoy.

Is a master, as a matter of law, bound to inquire at the Engineer's office at Duluth, Detroit, Buffalo or Chicago for information as to the piers and breakwaters that were being built by the Government, and is his not doing so negligence? We say he was not so bound to inquire, because the Government was issuing bulletins, notices to mariners from time to time *and actually sending them to the mariners,* stating the condition of all obstructions, or proposed obstructions, to navigation. These bulletins

applied to all obstructions or dangers to navigation. These were issued and delivered by the Government. He had a right to rely on them. Why should a mariner, therefore, make inquiries? Must he apply to every department of the Government before he is safe in attempting to navigate the great lakes? If so, how often should this onerous task be placed upon him? Was it fair to assume that the Engineer's department was not working in harmony with the hydrographic office, and was not promptly furnishing the latter with information of the work it was doing that would menace navigation, and that therefore the notices to mariners were not up-to-date or unreliable?

The Government did not notify mariners that supplemental information as to the work of the engineer's department was contained in bulletins issued by it, that could only be had on application at certain ports. Even the hydrographic officer of the Government failed to get the engineer's bulletin. Had he known that there was such information would he not have sought it? He did not get it, and yet he was charged with the duty of getting and sending out the information it contained. He did not send it out. Why should a master look for it—the hydrographer didn't. Why not? Is it not negligence that it was not sent out? Either the Government engineers were negligent in not giving the hydrographic office the information, or else the officer of the latter was negligent in not getting it and sending it out. If not getting it and sending it out is not negligence on the part of either, or both of these departments of the Government, why

should Captain McAvoy's neglect in not calling for this engineer's bulletin be negligence on his part, chargeable against the Steamship Company.

If the Government knew, why didn't it send out the information? The Government must be held and be bound by the conduct or misconduct of the officers of its different departments. What the Government knew through its engineer's department, it was bound to know in its hydrographic department. What the engineers knew, the hydrographer was bound to know, and it therefore resolves itself into this: That the Government knew that it had not sent out a notice to mariners that the breakwater was not finished in 1900 as stated in Exhibits "B" and "C," and that beginning with May and ending early in July, 1901, it had put in place all of the breakwater cribs, and that they completely obstructed navigation, and yet while knowing all this, its hydrographer did not send out a notice to mariners of these facts until after the collision. Which, therefore, was guilty of the greater negligence, the master who did not know of the obstruction because he did not call for the engineer's bulletin, Exhibit "D," or the hydrographer who was bound to know but who did not call for or publish it? If, under these circumstances, Captain McAvoy was guilty of negligence, was not Captain Heinrich, the hydrographer, or Captain Gaillard, the engineer, guilty of greater negligence? If the Government knew what Captain McAvoy did not know, and it did not tell him, then he cannot be held negligent for not asking for what he didn't know and therefore not knowing it. Before the Government can

recover, it must show that Captain McAvoy knew of the breakwater, or that it had given such notice of it that a prudent and skillful navigator would have learned of it in time to have enabled him to avoid it.

The Government has failed to show either actual or constructive notice, because it did not send out notice of the actual condition of the breakwater, although its engineer officer did know, and its hydrographer might have known and was therefore bound to know, its character as an obstruction, and it was the latter's duty to send out the notice to mariners, which he failed to do until after the fatal collision.

In this neglect the Government was so delinquent that it cannot be heard to say that Captain McAvoy neglected to do what the Government had first neglected to do. The Government having undertaken to warn mariners of what it was doing in obstructing navigable channels and waterways, placed mariners in such a position that they had a right to, and did rely on the information, and therefore did not depend upon other sources which they might have used or consulted had not the Government undertaken to give the information through its hydrographic office.

If the bulletins are notice, they must be held to be reliable notice, and must also be held to have been timely, so that they could operate as a warning of danger. They must be considered as truthful, until the contrary appears from a contradicting bulletin. In this case, the hydrographic bulletins did not contradict each other, on the contrary they corroborated each other.

The lighthouse book, the most important publication referred to in this case, must also be held to be reliable if of any value as a publication of the information it contains. Captain McAvoy consulted it as he should. It did not contradict the bulletins. It gave notice of a red light as marking the end of the breakwater. It said nothing about length, dimensions or other qualities of the breakwater. That was unimportant.

Why had not Captain McAvoy a right to rely on it, when the notice to mariners in no way contradicted or was in conflict with what the lighthouse book stated?

A red light was the only one referred to by the lighthouse book as marking the end of the breakwater. A red light was the only light that Captain McAvoy would look for or expect to find there. It was there, he saw it plainly and avoided it and the breakwater it was on.

He did not look for a bright light as marking the breakwater—he had no reason to.

The Government had stated the color of the light there was red and not white.

What excuse does the Government now make for using a white light there?

It is claimed that there is no law or regulation requiring a particular kind or color of light to be used as signals on breakwaters in course of construction. This may be true. It is nevertheless equally true that a dangerous obstruction to navigation, such as a line of rip rap directly across the mouth of a harbor, requires a light of the plainest and most unequivocal character—a light which will plainly indicate that there is danger and which will

not mislead the mariner. We have already shown how entirely misleading it was to maintain a red light on the end of the old breakwater without any effective notice of the breakwater extension and especially after giving notices through the hydrographic office in 1889 and 1890 that the breakwater would be completed in 1900, and notice in 1901 through the lighthouse board that the end of the (thus completed) breakwater was marked by a red light. We submit that no further argument should be required to show the utterly insufficient and misleading character of the white light which the Government actually placed upon the end of its rip rap extension.

Nor is it material that a white light had sometimes been used elsewhere to mark public works of this kind. If such lights are or may be misleading, no amount of improper use can make them a proper warning of a dangerous obstruction across an important harbor. Moreover, whatever their propriety in other localities, the notices sent out and the conditions existing at Two Harbors made them wholly improper here, where it is plain that the white light placed on the end of the breakwater was doubly misleading; first, because it was nullified and made to mean anything but a breakwater light by the Lighthouse Board's notice that the end of the breakwater was marked by a red light, and second, because under such circumstances it not only might but actually must mean to mariners an anchored vessel and not danger.

But there are other reasons why, in the absence of notice sufficient to put a mariner upon his guard,

the light placed on the end of the breakwater extension was misleading and improper. That light was a white light at least 330 feet away from the permanent red light near the end of the old breakwater. It was not on an extended east and west line of it, but was farther out in the bay. It was, moreover, the kind of a light prescribed by law for an entirely different purpose. It was an anchor light. It was in a place where vessels come to anchor, and where they would be required to display an anchor light.

Under the Act of Congress of May 28, 1894, entitled "An Act to Regulate Navigation on the Great Lakes and Their Connecting and Tributary Waters," it is, among other things, provided what lights vessels in motion and at anchor shall carry and display while navigating the Great Lakes and their tributary waters, they shall be as follows:

> "Rule 9. A vessel 150 feet registered length, when at anchor, shall carry forward, where it can best be seen, put at a height of not exceeding 20 feet above the hull, a white light in a lantern constructed so as to show a clear, uniform and unbroken light visible all around the horizon at a distance of at least one mile."

This was the kind of light that vessels at anchor in Agate Bay, or the vicinity, would be displaying. It was the same kind of a light that was being shown by the Government on this breakwater. The light was intended to warn mariners, not landsmen. How would the former understand it? Ought it not to be an unequivocal light, one that could not be misunderstood? It was not such a light. It was mistaken for an anchor light. The testimony shows it was bound to be so understood, for to a mariner

it had but one meaning: An anchor light. Captain McAvoy testifies that on the night of the collision he saw the light, and on page 20 he says:

"Q. I wish you would just tell the court and jury now, as you came within sight of the Bay, how you managed your ship with a view of entering the Bay on that night? A. On the night of the 24th of July?

"Q. Yes. A. Well, now, I kept her away from the harbor and checked down. Coming and checked down I saw this light ahead; I saw this bright light *and supposed it was a schooner there at anchor, or a barge rather.* I saw there was plenty of room between that light and the end of the breakwater for me; so I steered as near as I could about midway between both lights. I supposed I was going in clear until I see the breakwater down under her bows. Then I knew there was something wrong and gave the check to reverse the engines immediately."

Gaskell, the second mate of the Shenandoah, page 106, says:

"Q. What did you suppose the white light was, in your opinion? A. I supposed—*my opinion was that it was a boat at anchor.*

"Q. You mean you thought it was a boat at anchor? A. Yes, sir. That is the sort of a light they always carry.

"Q. Does a boat at anchor carry any other lights? A. No, sir.

"Q. What do you know about vessels coming to anchor there at the point where you say you thought there was a boat at anchor, where you saw the white light? A. I have seen vessels at anchor there. I have seen steamers come in there with a barge and drop it, and immediately they would go up to the pier, leaving the barge there for the tug to take care of.

"Q. Did you ever see them let go their anchor there? A. Yes, sir, I have.

"Q. When they let go their anchors what did they do with their under way lights? A. The first thing they do when they let go their anchor is to have the lights down and put up the anchor lights.

"Q. Does it make any difference how long you are going to stay at anchor? A. No, sir. You are supposed to have them up if you are only going to anchor five minutes."

Captain McAvoy, on page 95, again says:

"Q. Did you have any idea at that time, and if so, what, as to what the bright light marked? A. I thought it was a schooner or something or a barge that had been towed in there and dropped anchor and had dragged her anchor.

"Q. Tell about the custom as to barges going in there to anchor, or being dropped there; tell us about that. How is that done? A. Well, they generally, with a northeast wind blowing, they go around the breakwater when they cast off the tow line from the steamer. Some go ahead as far as they can. If they can't make the dock they let go anchor there. They generally carry their anchor on the rail ready to drop it. Sometimes they can get up to the ore dock, but it is very seldom that they can make the ore dock."

Page 96:

"Q. When a vessel comes to anchor what lights does she show, and when she is under way what lights does she carry? A. What lights does she show?

"Q. Yes, when she is under way what lights does she show? A. A red light and a green light.

"Q. And when they are lying at anchor what lights do they show? A. A bright light. That is, they hang a bright light in the rigging.

"Q. Had you ever known vessels to come to anchor there that way? A. Yes, sir.

"Q. State whether or not you have known times when they have dragged anchor out of the harbor there near the pier? A. I see one while we lay there this time when I had the collision.

"Q. Tell us about that? A. Well, a boat was brought up and the steamer let her go a little inside the breakwater and before the tug got to her she dragged down abreast with the breakwater inside of it probably 400 feet.

"Q. Out in the lake? A. Yes, sir. Outside on the west breakwater.

"Q. These lumber vessels, about what is the size of them. A. There is a great many of these ordinary canal size steamers, from 140 feet, and from that up.

"Q. And how about the barges? A. The barges are some of them less."

All the testimony of the expert ship masters is, that a bright light, such as was displayed here by the Government at that point in the darkness, and without the knowledge that it was marking the end of a breakwater, would be taken by mariners for the light of a vessel at anchor.

Captain Leisk, page 125, says, speaking of a white light:

"Q. What would an average mariner assume that it was? A. A white light indicates a signal on some floating object *such as an anchored vessel*, or it might be a small yacht, for instance. We meet all of these things coming into the harbor. Naphtha launches, boats traversing back and forth.

"Q. If you saw this light and took it to be 20 feet above the water, what would you take it to be? A. The Government for vessels at anchor specifies that we shall carry a bright light not to exceed 20 feet above the vessel's deck,

naturally a light 14 to 20 feet high would be considered a vessel at anchor."

Captain Chilson, who was asked the question, testified on page 131:

"Q. Assuming further, Captain, that the white light you saw was anywhere from 14 to 20 feet above the water? A. You might take it for different things. A man coming in from the lake might take it for a light on the shore, *or take it for a boat at anchor.*"

Captain Lyons testified, on page 135:

"Q. What is a single light used for if it is stationary; what is that commonly understood to mean to the average mariner in the water? A. Generally means it is a floating object or lying at anchor."

Captain Frank testified, on page 141, speaking of the light:

"I should judge it was, I should think *it must be a vessel at anchor,* or some boat out from the harbor."

Captain Allen, page 149, testified:

"Q. Supposing you are entering the harbor of Two Harbors at night; it was a dark night and you saw a red light, and if, in your book, you found that a red light marked the end of the breakwater, and suppose some 300 to 500 feet away from you that you saw a single white light, what would these lights indicate to you in approaching the harbor at that time? A. *Something lying there at anchor,* or a floating object."

Captain Girard testified, page 159, when asked practically the same question that was asked the last witness:

"A. *I should consider it to be a vessel lying at anchor,* and that I should be justified in taking the other side of it and going into the harbor."

Captain Gaillard, the Government engineer, page 61, admits that he did not know what kind of a light a vessel at anchor displayed.

It is not strange that collisions occur when the Government officers do not even know the lights required by law. How could they use the proper light when they did not know the meaning of lights? Here the Government official was obstructing navigation, interposing an artificial reef across the path of every vessel that entered this port without giving any notice to anyone, and then using a light the meaning of which, to a mariner, he didn't know. Is it to be wondered that a mistake was made by the Government?

From this evidence, therefore, it must be perfectly apparent that the white light was a misleading light, and the Government officers ought to have known it, and therefore it ought not to have been used.

A misleading light is as bad as no light at all. In numerous collision cases this question has been considered and we find upon this the following decisions:

Displaying Wrong Light.

The Excelsior, 39 Fed. R., 393, was a case where a steamer was proceeding down New York harbor at night. The master observed a white light ahead, but no colored lights. Thinking it to be a vessel going in the same direction, he changed his course sufficiently to give the white light a wide berth, but

instead of its being a steamer going out, it proved to be a sailing vessel passing up the harbor, but with only one light displayed, and that a white light contrary to the statute. *Held,* that the sailing vessel was wholly at fault.

Connolly v. *The Brandywine Granite Co.,* 108 Fed. R., 99, was a case where a dredge was anchored in the Delaware River, without displaying the lights required by law for vessels at anchor. An up-bound vessel in tow of a tug collided with the dredge. The court says:

> "The lanterns of the dredge did not obey this rule. The place where they hung was not where they could best be seen and neither light could have been visible even in clear weather at the distance of a mile. Whether, if the light had been properly placed, it could have been seen in time by the tug in spite of the fog, it is impossible to decide. But the dredge should have obeyed the regulation and then if her light had been so obscured by the fog as not to be visible, she would not have been to blame. *As matters stand, while one cannot be sure upon this point, I think the dredge ought to have shown clearly that her fault in this respect had no effect in producing the collision.*"

The Sciota, 81 U. S., 170, was a case where a vessel was held at fault for carrying a white light on deck instead of at its masthead.

The Conoho, 24 Fed. R., 758, was a case decided in 1885 by the District Court for East Virginia. The statute requires a range light to be carried by steamers. The vessel in question carried only a masthead light, which gave it the appearance of a vessel at anchor. The court says the strict observance of these rules of navigation is necessary to

the safety of navigation. An approaching vessel which sees only a white light on the other vessel and regulates her movements on the assumption that such vessel is at anchor, is not in fault in case of collision, but the other vessel is solely liable.

Foster v. *Merchants & Miners Trans. Co.*, 134 Fed. Rep., 964. In this case a tug had her two white towing lights placed 3 feet apart instead of vertically one directly over the other and she was held at fault for the collision.

The Frank Moffat, Fed. Cases, No. 5060, decided by Judge Brown, E. D., Mich., in 1878, was a case where a propeller was aground on the St. Clair Flats. A tow, up-bound, collided with it. The propeller was condemned for not exhibiting the light required by law. The courts says:

> "A fault proven to have been committed is presumed to have contributed to the collision, and the want of a proper light has always been considered a fault of the grossest description."

Casement v. *Brown*, 148 U. S., 615, was a case somewhat similar to the one at bar. Casement & Co. were constructing the piers of a R. R. bridge over the Ohio River near Cincinnati. One of the bridge piers was submerged by the high water then prevailing. This submerged pier had been designated by lights at night and buoys by day. The high water carried away the buoys designating the submerged pier. A steamer with a tow was descending the river in the day time and ran on and injured this submerged pier. An action was brought by the contractor for damages caused by the barge. The absence of the buoy was not known

to the steamboat men. The absence of the buoy was known to the contractors early that morning. They made no effort to replace it, nor did they send any one up the river, as they might have done, to notify descending vessels. The trial court held:

> "That it was the duty of the contractors to keep a buoy upon the submerged pier, and if it was washed off, to replace it, or if this could not be done, they should have sent some one up stream a sufficient distance to notify approaching vessels, or adopt some plan to notify vessels of the changed conditions. That failure so to do was such negligence as would prevent recovery."

This holding was affirmed by the Supreme Court. The Supreme Court, in deciding the case, says:

> "The steamboat men knew that here was a great work being constructed by defendants; that it was their duty to give all needful warning to persons and boats going up and down the river, and that there were no buoys in place, or other warnings given, they might fairly conclude that all of these piers were so far submerged as to threaten no danger to passing boats. Shall the vessel men be condemned because they relied upon the contractors' faithful discharge of their duty of giving suitable warning and, in the absence of such warning, believed there was no danger?
>
> "The judgment is affirmed."

In this last case the contractor was held liable although the master of the steamer knew that the work was going on. In the present case the master did not know of the construction, and had a light been used which would indicate danger and not a vessel at anchor, this collision would not have oc-

curred and the damage would not have been done.

The Government officers ought to have known the meaning of vessels' lights. These lights speak to the mariner as if they were words. They stand for and mean certain things. The testimony shows that the Government officers did not know what the meaning of such a light was, and therefore misled the mariner. The Government must be held answerable for this and the damage which was occasioned through it.

THE GOVERNMENT SHOULD HAVE USED A RED LIGHT TO MARK THE END OF THE NEW CONSTRUCTION.

That a white light exhibited at the end of this submerged breakwater was a misleading light is clearly shown by the evidence. It is equally clear that had a red light been used it would not mislead a mariner. A red light at sea or at the point where this white light was exhibited, on a dark night, like the night of the collision, would be examined by a mariner to determine whether it was a stationary or a moving light. It was too dark to determine what it was on or how it was displayed, and in this darkness no one could tell whether it was on a ship or afloat, or on a pier or breakwater, and therefore stationary. The light must be taken merely as a signal independent of what it was on. It appears from the evidence that a red light in a lake, bay or river, when it is not known to be placed upon a stationary object, is displayed only as the port light of a moving steamer or vessel.

The Act of Congress, giving the Rules of the Road at Sea as to the lights to be carried by steamers

and vessels in motion, paragraph C of Rule 3, provides:

> "C. On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles."
>
> "D. Said green and red lights shall be fitted with inboard screens projecting at least three feet forward from the light so as to prevent these lights from being seen across the bow."

Rule 6 provides:

> "A sailing vessel under way and any vessel being towed, shall carry the side lights mentioned in Rule 3."

It is the law, and mariners all know it, that a red light is a side light, and that as such it is only displayed on a moving vessel, and cannot be seen from astern or behind, as the screen in which it stands prevents its being seen from any point except dead ahead for an arc of the circle of 110 degrees, this being ten points abaft the beam, or just beyond a right angle from dead-ahead, or to speak accurately, 22 degrees beyond a right angle, which is 92 degrees of a circle.

The red light, as provided by law, when carried on a vessel, is only displayed on a moving vessel. Never on a stationary one. As Capt. McAvoy approached Agate Bay, had the Government displayed a red light instead of a small white light, he could have easily determined whether the red light was moving or fixed. If it had been moving it would then conclusively indicate that it was on a moving

vessel, and if stationary the character of it would be equally conclusive, as every mariner would then know it to be a danger signal. As a stationary light it would have no other significance to a mariner because it could be used but for one other purpose, and that was on a moving vessel. Being stationary, it would therefore be an extraordinary light, and one that would indicate danger when displayed in a bay or place in the proximity of a harbor where one might look for a stationary light of this kind.

Even on shore a red light is considered a signal of danger. It is a matter of common knowledge that such lights are used to mark obstructions and excavations in the highway. This is well known. It has the same significance at sea. This is the testimony from the expert ship masters on this subject.

Capt. Chilson, page 132:

"Q. Captain, what to a mariner does a single white light indicate out in the water of a bay? A. It would indicate different things. *It would indicate a vessel at anchor or a small boat.*

"Q. I mean a red light? A. That would mean there *was an obstruction there of some kind.*

"Q. Does a single red light have any other significance among mariners than that of a danger signal? A. If you are in a harbor or ascending a stream a red light would be on the starboard—in ascending a stream or entering a harbor.

"Q. What you mean by that is if you saw a red light in a stream or harbor you would pass to the left of it? A. Yes, sir.

"Q. And leave it on your right? A. Yes, sir.

"Q. If you saw it out in a bay, or where you were not in a stream, what would a mariner take it to indicate? A. *It would be a danger signal.*"

Captain Lyons, page 136:

"Q. What does a single red light, stationary in a roadstead, bay or lake, mean to a mariner? A. In a roadstead, lake or bay?

"Q. Yes. A. I could make two answers to that, sir. In the lake if I would see a red light low to the water I would suspect it to be a schooner under sail.

"Q. If the light was stationary, I mean? A. If it was stationary *I certainly would take it to be a danger signal.*"

On cross examination, on page 137, this witness says:

"Q. Assuming that you saw a red light—fixed red light—at the westerly end of the east breakwater, and you supposed that was the end of the breakwater, and out further, say a distance of 500 feet, you saw a red light, now, that red light would not in any way prevent you rounding the breakwater in the ordinary way and going into the harbor, would it? A. Yes, sir, it would. Because I would not take it for granted that this first red light was the end of the breakwater. If I picked up my Lighthouse book and saw that the new breakwater was marked by a red light, a fixed red light, just as soon as I saw that I would go around the two. I would try to get around the last red light, if possible—that is, if I thought it was on the west end of the east breakwater."

Captain Frank, page 140:

"Q. Having a white light at the entrance to Agate Bay, what would it indicate to a mariner? A. It would indicate a vessel at anchor.

"Q. Seeing a single red light, without an accompanying light, stationary, what would that indicate? A. At that point?

"Q. Yes. A. Well, it is the end of the pier. It was always our mark to keep clear of that light."

Page 141:

"Q. How would you enter with reference to the red light if the light, as the book indicated on the end of the pier, was marked with a red light? A. I should naturally suppose it was that light.

"Q. In what way would you come in? A. I would expect to clear it as usual.

"Q. In what way would you clear the red light? A. We used to go in with our vessel within 40 or 50 feet of it."

On page 143:

"Q. You never saw cribs there (meaning Agate Bay)? A. No, sir, only those they were sinking; *I suppose the red light was always at the end of these cribs.*"

Captain Girard, page 160:

"Q. What kind of lights are used on the lakes to notify mariners of dangerous obstructions in the way of navigation? A. *Red lights, universally so.*"

In addition to this evidence it clearly appears from the evidence of a number of witnesses, including the nautical expert, Heinrich, that the Government had used red lights at different points to mark breakwaters and piers in the course of construction. The Government contends that a white light was the only kind used for this purpose, but the evidence of those who saw red lights on breakwaters is better

evidence than the evidence of the Governmnent engineers, who can testify only to the lights used on the Government work in Lake Superior.

Captain Gaillard's testimony shows that he came to Lake Superior from the seacoast, and therefore was not familiar with the lights and signals used on the Great Lakes.

The best reason, however, for using a white light instead of a red light is that Capt. Gaillard was not familiar with the law in relation to lights carried by vessels, or of the fact that different lights were used on vessels in motion and vessels at rest. He testifies on page 61:

> "Q. Captain, were you, in 1901, familiar with the laws of the United States which provided for the kind of lights that vessels should exhibit at night while under way and at anchor? A. I was familiar with those they should exhibit while under way, but I can't say that I was thoroughly familiar with those they should display while at anchor.
>
> "Q. Did you use that white light there on that breakwater because it was a light that a vessel at anchor usually displays? A. Because the chief engineer approved the specifications which called for a bright light, and I could not have changed that light if I had wished to.
>
> "Q. Do you know whether or not the Government, or any of its officers, had in mind that that light resembled a light that was carried by vessels at anchor? A. I don't know."

It is therefore not strange, when the Government officers are not familiar with the law which provides for the lights that vessels shall carry when in motion and at anchor, that they should use a white light, or any other kind of light that would best suit

their convenience, without regard to how it might be considered or mistaken by a mariner? It is a remarkable admission for an engineer construct harbor work to make.

It conclusively appears in evidence that Capt. McAvoy, while on his way from Superior to Two Harbors on the night of the collision, consulted the Lighthouse book issued by the United States Government, and which was offered in evidence, marked Exhibit 1. He testifies, on page 93, after stating that he examined the book:

> "Q. Look at that book. Is that a book like the one you used? A. Yes, sir.
>
> "Q. Will you turn to the page and give the page on which you had the information relating to the Two Harbors lights? A. Page 82.
>
> "Q. What is it that you found there? A. I found that Two Harbors had a red light on the breakwater. Two Harbors is a fixed white light.
>
> "Q. Is there anything in that book indicating any other lights than a white light on the shore and a red light on the breakwater? A. No, sir.
>
> "Q. Did you or did you not have that information that night before you went there? A. Yes, sir, I did."

The particular entry in the Lighthouse book is found on page 166, and it states:

> "On the outer end of the breakwater at the easterly side of the entrance to Two Harbors, northwesterly shore of the westerly end of Lake Superior, Minnesota. Characteristic of light: fixed red. Kind of light: lens lantern. Height of light above the lake level in feet: 30 feet."

It is in evidence that all shipmasters consulted the Lighthouse book for the purpose of ascertaining the character and color of the light which marks the entrance to a port or harbor. Every expert master so testified. This Lighthouse book is published by the Lighthouse Board of the United States Government, and should give correctly the color and character and other description of the lights which are displayed at the different points, harbors and piers. In this case the light given was a fixed red light. This undoubtedly meant the red light which was a fixed light such as had been used on the old breakwater. The Lighthouse book, therefore, was misleading in that it did not state that there was an additional white light at the end of the new extension of the breakwater. It was specially misleading because the light placed there as a temporary light, was a white light. Had it been a red light the mariner might have considered, just as some of the expert masters have testified, that the red light, the outer one, was the one which marked the end of the breakwater. It could be taken for nothing else unless it might have been taken as a danger signal marking a wreck or some other obstruction like a crib, pier or breakwater, and in any of these cases it would have been avoided by every mariner, because it would have indicated either the end of the breakwater, which he must round to enter the harbor, or else a dangerous obstruction which a mariner would approach with caution, and in this way could, upon approaching it, learn that it marked a breakwater over which the heavy sea was breaking, and it then could have been avoided without difficulty. As it was, Capt. McAvoy was misled, just as any

mariner would have been, and, taking the white light as one displayed by a vessel at anchor, he passed a safe distance from it and keeping a safe distance from the fixed red light, proceeded with caution until he was too close to avoid colliding with the breakwater.

In the case of *Hornson* v. *Hughes,* 110 Fed. Rep., 545, a vessel collided with a submerged breakwater which was being built near the mouth of Delaware Bay. The breakwater extension had been lighted by a temporary light, which was placed on the extension, but which had been blown out at the time of the collision. The court held that those in charge of the construction of the breakwater were at fault for their failure to keep the light burning. *That it was the duty of those building the breakwater to maintain such lights as might be necessary to give proper warning to vessels, even if it necessitated the use of other or different lights provided for in their contract with the Government.* It was held, therefore, that no recovery could be had.

The case of *United States* v. *Charles G. Dunn Co.,* 124 Fed. Rep., 705. This was an action brought by the United States for damage to a Government pier in the Delaware river. The pier was 50 feet wide by 250 feet long, its outer end being protected from the ice by an ice break 75 feet long. The pier was lighted at night by an ordinary white anchor light. A steamship coming up the river at night in charge of a duly licensed pilot, collided with the pier, doing damage amounting to about $8,000 to the pier. *The court held that the pier was insufficiently lighted and no recovery could be had. After the colli-*

sion the outer and inner ends of the pier were lighted by red lights. It was held the Government could not recover.

These cases bear out what we contend for. In the first case the Government and contractor could not justify the use of a particular light because the contract so provided.

In the last case, like in the case at bar, a white light was condemned as insufficient, and two red lights used in its stead.

The Government having by its latest official publication, the Lighthouse Book, notified mariners that the outer end of the breakwater in question was marked by a red light, should not have substituted a different light to mark the outer end, *without first having given notice of such change,* through the usual channel of giving such information. There is no dispute on the question as to whether any notice of such change was given by the Government. It is admitted that no such notice was given prior to the accident. It is in evidence that vessel masters rely on the correctness of these Lighthouse books. Captain McAvoy had a right to rely on this book, issued by the Government to him.

Our position is that the Government has failed to bring home to Captain McAvoy any knowledge or to charge him with any notice whatever either actual or constructive of the existence of breakwater extension at Two Harbors; that he was consequently justified in entering the harbor with the lighthouse book corrected up to within three months as his guide, and in regarding a white light out in the fairway as the anchor light of a vessel.

If, however, the court should take the view that Captain McAvoy was bound to take notice of the bulletins of the hydrographic office (Exhibits "B" and "C") because somebody mailed them to the Detroit marine post office and of the chart of Agate Bay (Exhibit "A"), because that is an ordinary aid to navigation, then we ask the court to take these exhibits and construe them together just as Captain McAvoy was entitled to construe them if he had had them all with him that night. We submit that read together, they can only mean one thing, *i. e.*, that the breakwater extension was finished in 1900 as projected, and that the end of the completed breakwater is now marked by a fixed red light. Upon the Government's own contention, therefore, the captain was justified in regarding the white light as anything rather than a breakwater or a danger light.

To sum up we submit that the evidence acquits the defendant of negligence and conversely convicts the Government of contributory negligence, for the following reasons:

First. The bulletin of July 29, 1899, Exhibit "B," was notice that a breakwater would be built and finished in 1900.

Second. The bulletin of August 11, 1900, Exhibit "C," was a notice of the progress of the work and nothing to indicate that the work would not be completed in 1900, as set forth in Exhibit "B."

Third. The lighthouse book stated and construed in connection with previous notices meant that a red light marked the end of the east breakwater completed.

Fourth. The Government did not send out a bulletin showing the actual condition until after the collision, but left mariners to suppose the work completed.

Fifth. No contrary information could be found in the chart, Exhibit "A," or in the engineer's bulletin, Exhibit "D," and, moreover, these exhibits were not sent to mariners through the usual channels by which the Government sent out such information, but had to be hunted up and called for.

There was no evidence whatever that Captain McAvoy knew the actual condition of the breakwater at the time of the collision, and no evidence that he had received any notice whatever of the actual conditions there. There was no evidence that such notice as he was supposed to have received was competent to put him on inquiry in 1901, when the bulletins stated the work was to be completed in 1900. There was no evidence that the Government had informed mariners where they could obtain further information.

There was, therefore, no competent evidence whatever against the defendant. The Government, on the contrary, was affirmatively guilty of negligence as follows:

First. In failing to send out a bulletin of the actual conditions.

Second. In stating in the lighthouse book that a red light marked the end of the breakwater, which, according to its notice, was to have been completed the previous year.

Third. In displaying on the end of its rip rap,

300 feet beyond the red light referred to in its lighthouse book, the anchor light of a vessel instead of a recognized signal of danger.

There was, therefore, no negligence proven against the defendant by competent evidence, and the evidence clearly shows such contributory negligence on the part of the Government as would prevent a recovery in this case.

The judgment of the Circuit Court should, therefore, be reversed.

CHARLES E. KREMER,
HERMON A. KELLEY,
Attorneys for Plaintiff in Error.

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